

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE**

AMERICAN SPIRIT AND CHEER
ESSENTIALS, INC., *et al.*,

Plaintiffs,

v.

VARSITY BRANDS, LLC, *et al.*,

Defendants.

Civ. Action No. 2:20-cv-02782-SHL-cgc

Jury Trial Demanded

**DEFENDANTS' MOTION TO STRIKE UNTIMELY EXPERT REPORT AND FOR
COSTS AND MEMORANDUM IN SUPPORT THEREOF**

Come now Defendants Varsity Brands, LLC; BSN Sports, LLC (“BSN”); Varsity Spirit, LLC; Herff Jones, LLC (“Herff Jones”); Varsity Brands Holding, Co., Inc.; and Varsity Spirit Fashions & Supplies, LLC (collectively, “Varsity”); U.S. All Star Federation, Inc.; USA Federation for Sport Cheering d/b/a USA Cheer; and Jeff Webb (with Varsity, collectively, “Defendants”), by and through counsel, and move this Court to strike Plaintiffs’ out-of-time expert rebuttal report and for their costs in filing this motion.

As the Court is aware, as part of their general gross disregard for their discovery obligations in this case, Plaintiffs have disregarded this Court’s discovery deadlines and flouted this Court’s discovery orders on numerous occasions. In that regard, currently pending before the Court are Defendants’ motions for the sanction of dismissal. (ECF Nos. 238, 263.)

Plaintiffs continue to not adhere to the Court’s scheduling orders. The latest instance is their service, on March 15, 2023, of a purported “rebuttal” expert report. The deadline for the service of such reports was March 13, 2023. (ECF No. 236.)

Plaintiffs' late-served expert report should be stricken, and Plaintiffs should not be permitted to use the information or opinions disclosed therein for any purpose. Fed. R. Civ. Pro. 37(c)(1). "If a party does not comply with the requirements of Rule 26(a) or (e), then it is subject to the automatic and mandatory sanction of Rule 37(c)(1)." *Edwards v. Aldi, Inc.*, No. 17-cv-10648, 2018 WL 2181082, at *2 (E.D. Mich. Jan. 8, 2018). Plaintiffs' untimely service was neither "substantially justified" nor "harmless." Fed. R. Civ. Pro. 37(c)(1). Plaintiffs neither moved the Court to change that deadline nor even gave Defendants any advance warning that they intended to serve a report after the deadline. Exclusion in this case is particularly warranted because, as is well-documented, Plaintiffs have been extremely dilatory in the discovery process. *See, e.g., Matilla v. S. Ky. Rural Elec. Coop. Corp.*, 240 F. App'x 35, 43 (6th Cir. 2007).

Defendants respectfully renew their request that Plaintiffs' case be dismissed for the gross discovery violations that were the subject of their original motions. Defendants further request that Court strike the report as untimely and award Defendants their costs in bringing this motion. Insofar as Defendants are scheduled to take the deposition of the expert on April 12, the deadline for taking such depositions, Defendants further respectfully request expedited briefing and resolution of this motion.

Dated: March 16, 2023

Respectfully submitted,

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CERTIFICATE OF CONSULTATION

I hereby certify, pursuant to Local Rule 7.2(a)(1)(B), that on March 15, 2023, I contacted counsel for Plaintiffs via electronic mail to determine whether Plaintiffs oppose the relief sought in this Motion. Plaintiffs indicated that they oppose this motion.

/s Steven J. Kaiser